



GES NewsFlash

United Kingdom – Update on the Likely Impact of the Draft Legislation on “Disguised Remuneration” on Regular Expatriate Assignments

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March 2, 2011

Summary

On January 21, 2011, we issued a Global Employer Services (GES) Newsflash outlining why regular expatriate assignments could be impacted by the draft legislation on so-called “disguised remuneration.” Deloitte and others have been in regular contact with Her Majesty’s Revenue and Customs (HMRC) about the proposed changes and on February 21, 2011, HMRC issued answers to some of the frequently asked questions (FAQs) we have raised. Overall, the answers given are helpful although there are still some areas of uncertainty. These are explored in more detail below.

Do secondment arrangements give rise to third-party arrangements?

In our earlier GES Newsflash, we explained that the disguised remuneration legislation applies where payments or benefits are provided by a “relevant third party” and that this could catch secondment arrangements where the host entity pays or provides some or all of an international assignee’s remuneration.

HMRC has now confirmed that it intends to amend the draft legislation in order to address the concerns raised about group companies although the amendments will be subject to an anti-avoidance rule. Although, we need to wait and see what the revised legislation actually says, it sounds as if intragroup secondment arrangements may not fall foul of the legislation after all (although individual items of remuneration might — please see below).

Loans

As explained previously, loans provided by a third party are caught by the draft legislation.

HMRC has made clear that loans continue to be a key target of the disguised remuneration legislation, but it has advised that some loans may be carved out. The carve-out is expected to apply to loans made by one group company to employees of another group company, and may also be extended to certain short-term loans made by a lender outside of the group. The carve outs will be subject to an anti-avoidance test.

Again, we must wait for the revised legislation to be published, but the expectation is that tax loans and company loans made to facilitate the purchase of shares under a regular share plan will not now be caught.

Relocation benefits

Many companies outsource relocation services to a third-party provider and could thus be caught on the basis that the relocation company is a “relevant third party.” As noted above, the FAQs confirm that the draft legislation will be amended to address the concerns raised about group companies. There is some suggestion that other innocent third-party arrangements may also be carved out, but it is not yet clear whether this will extend to relocation companies. Deloitte will continue to press for relocation companies to be carved out. If they are not, the £8,000 exemption will be lost, unless an amendment is made to allow it under the disguised remuneration rules.

Bridging loans made in conjunction with an employee's relocation may not now be caught, but this is subject to the way the draft legislation is amended to deal with loans made by group companies and other short-term loans (please see above).

Deferred compensation plans

HMRC has confirmed that amendments will be made to the draft legislation to ensure that deferred compensation plans will now not be subject to a UK tax charge at the time the deferral is made provided all of the following conditions are met:

- The deferred rewards must be subject to meaningful forfeiture conditions
- The vesting date must not be more than five years after the date of deferral
- On vesting, the deferred reward must be subject to tax as employment income
- The deferral or avoidance of tax must not be the main or one of the main purposes of entering into the arrangement

The above provides some encouragement, particularly in the case of compulsory deferrals. However, it also raises a number of concerns, including each of the following:

- The position where a deferral is made voluntarily as the deferred reward may not be subject to meaningful forfeiture conditions

- The position where the deferred reward vests after an individual has left the UK and is no longer liable to UK income tax
- The position where the deferral period is more than five years.

Employers who operate deferred compensation plans are advised to consider the implications of the above closely.

Non-UK pension arrangements

Non-UK pension arrangements that are not “overseas pension schemes” remain a key target of the draft legislation, although HMRC has confirmed that it will not apply to “wholly unfunded” arrangements.

Other key pension-related matters addressed in the FAQs include:

- Where benefits are provided in the form of a pension (as opposed to a lump sum), the UK’s pension legislation will take priority over the legislation on disguised remuneration. This is welcome news, but readers of this GES Newsflash should be aware that the UK’s pension legislation does not cover pension income paid from a non-UK scheme to a non-UK resident.
- The extent to which lump sums can be exempted under the provisions of Extra Statutory Concession A10 (ESC A10) has been restricted. Only the proportion of any lump sum received that is referable to contributions or rights accrued before April 6, 2011, will fall within the scope of ESC A10.
- Transfers between correspondingly accepted pension schemes will be exempted from a tax charge under the disguised remuneration rules but only to the extent that the transfer value is referable to contributions or rights accrued prior to April 6, 2006.

Deloitte’s view

The FAQs have provided welcome assurances on some fronts, but have not yet fully addressed all of the concerns we have raised about the scope of the draft legislation and its impact on wholly innocent arrangements. We will continue to discuss our concerns with HMRC and hope that the next tranche of FAQs will provide additional comfort for employers of internationally mobile employees. We also await the revised draft legislation and hope that it provides a pragmatic framework within which employers are able to operate the new rules.

People to contact

If you have any questions concerning the issues in this GES NewsFlash, please contact one of the tax professionals as follows:

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